

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARL A. SALUCCI

Claimant

VS.

YRC WORLDWIDE CORPORATION

Self-Insured Respondent

Docket No. 1,026,109

ORDER

STATEMENT OF THE CASE

Respondent requested review of the January 7, 2008, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on April 2, 2008. Mark E. Kolich, of Lenexa, Kansas, appeared for claimant. Wade A. Dorothy, of Overland Park, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant was subjected to an explosion of fireworks in respondent's bathroom and suffered physical harm from the incident. The ALJ found that the incident appeared to be an instance of horseplay rather than a deliberate attempt to injure claimant. Accordingly, the ALJ found that claimant sustained an injury that arose out of and in the course of his employment with respondent. The ALJ awarded claimant a 20 percent permanent partial impairment to the body as a whole, which was a split of the impairment ratings of Dr. J. Brent Koprivica and Dr. Peter Bieri.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues that claimant has not sustained his burden by a preponderance of the credible evidence that it is more probable than not that he sustained personal injury by accident arising out of and in the course of his employment on September 13, 2005. In the event the Board finds that claimant did suffer personal injury by accident arising out of and in the course of his employment, respondent argues that Dr. Bieri's impairment rating of 5 percent was the most credible.

Claimant requests that the ALJ's Award be affirmed in its entirety.

The issues for the Board's review are:

(1) Did claimant suffer an injury by accident that arose out of an in the course of his employment with respondent?

(2) If so, what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant worked for respondent as a janitor/maintenance person. In the early morning hours of September 13, 2005, he went into the men's restroom. He was in the middle stall when he heard someone enter and then leave the restroom, and then there was a very loud explosion and a flash of light. The next thing he knew, he was outside the restroom lying on the floor of the dock, and paramedics were over him. He was taken by ambulance to the Kansas University Medical Center.

At the emergency room, he complained of dizziness, blurred vision, ringing in his ears, neck pain, head pain, back pain, and nausea. A CT of the head was normal. Claimant was released from the emergency room to go home. After he was released from this hospital, his father took him back to work, where he spoke with his supervisor, Rick Gladfelder. Mr. Gladfelder showed him what appeared to be shredded remnants of an explosive that were found in the bathroom.

Claimant was off work a couple of days and then returned to light duty work with restrictions. Respondent sent him to OHS Compcare (OHS) for treatment. He was first seen at OHS on September 19, 2005, at which time he continued to complain of nausea, vision problems, and pain in his back and neck. X-rays of his cervical spine were negative. Claimant did not complain of problems with his hearing on September 19, but at an office visit on September 23 he complained of continuing tinnitus. He also complained of dizziness, nausea, balance problems, blurred vision, and headaches, as well as pain in his neck and upper back.

The medical records do not indicate that claimant was taken off work by a doctor, but his restrictions were that he was to perform seated work only. He testified he was on modified work for awhile, and then was told he could not work. He was off work about four weeks. He was released from care by OHS on November 18, 2005, to return to full duty with no restrictions. His final diagnosis was neck and back pain secondary to cervical, trapezius, thoracic and lumbar strain and concussion by history with post concussion syndrome. Claimant continues to work for respondent.

Claimant testified that in the early morning hours of September 13, there were other incidents of fireworks being set off around the dock area. He believed that someone was playing around.

Tim Flatt works as the service coordinator at respondent and is in charge of the dockmen. On September 13, 2005, he was in the dock area from midnight to 5 a.m. He testified that he was not aware of any type of explosion or firecrackers being set off at any time during that night. He was the person who found claimant. He was walking down the dock and saw claimant lying unconscious on the floor about 20 feet outside the restroom door. He told a coworker to call 911.

About 10 minutes after Mr. Flatt noticed him, claimant started to come around. Mr. Flatt asked him what happened, and claimant said, "Boom, big explosion."¹ Mr. Flatt asked him what he meant, and claimant said, "Half stick of dynamite went off in the bathroom."² Mr. Flatt was speaking in a normal tone, and claimant appeared to hear him.

At the time of this incident, Rick Gladfelder was operations manager for respondent's Kansas City, Kansas, terminal. He was working in his office on September 13, 2005, at the time of the event described by claimant. A cinder block wall separates the office area from the dock area. He did not hear any unusual noise or explosion. He was called by Tim Flatt, who told him that claimant was lying on the dock and paramedics had been called. He went to the dock and saw claimant lying on the dock.

After Mr. Gladfelder observed claimant, he went into the restroom. In front of the four urinals was a confetti-type of debris—probably a three-foot diameter debris area. He noticed smoke, as well as the debris on the floor. In the middle toilet stall, there was a black powder substance on the seat and in the water. There was no confetti substance on the toilet seat or in the bowl. The residue on the toilet seat was not saved.

Mark Manville, a dock worker, testified that he did not hear any explosion during the early hours of September 13 and was not aware of any firecrackers or other type of explosive devices going off while he was working that shift. He testified that he was working near the restroom early that morning and at one point saw the claimant standing, looking around. He did not see claimant collapse or lie down. He heard later that claimant was found lying on the floor of the dock.

Mike Whetsel testified that he was working in the hostling yard the early morning of September 13, 2005. He heard firecrackers going off three times in various places on the dock between the trailers during his shift. He said that firecrackers going off was not a

¹ Flatt Depo. at 7.

² *Id.*

normal occurrence, but they were going off that night. They were very loud and sounded like an M-80. He did not hear any type of an explosion right before seeing claimant lying on the dock, but he was dropping off a trailer in the back lot at that time.

Mike Widebrook testified that he worked on September 13. As he was walking up the dock going to the break room, he heard people talking about noise, making comments such as "Boy, that was a good one," and "Did you hear that?"³ From the conversations he heard, he gathered there was some horseplay going on that morning. He was inside the main building, however, and did not hear any explosions. He did not think he would have been able to hear an explosion in the dock area when he was inside the main building.

As Mr. Widebrook got closer to the building he saw claimant lying on the dock floor. The paramedics had not yet arrived. He noticed something about the restroom and walked in. The restroom had a haze and a smell of firecrackers. There was evidence that a firework of some kind had gone off in the restroom. He saw pieces of paper and a partial tube. The restroom had smoke so he opened up the doors at both ends so it would clear out. He started picking up the pieces of paper, as did Mr. Gladfelder.

E. J. Feedback works for respondent as a security manager for special operations and special investigations. He conducted an investigation into the circumstances giving rise to the alleged explosion on September 13. He conducted interviews and found no one who heard the explosion the early morning of September 13, 2005, as described by claimant. He also conducted a simulated explosion on October 11, 2005, at approximately the same time of the morning claimant said it occurred, with the same people in the approximate positions they were at the time the alleged explosion occurred. He used an M-80 left over from a 4th of July party at his residence. In setting off the M-80, he suspended it approximately two feet from the ceiling of the restroom to simulate the M-80 being thrown into the restroom. His report notes that in comparison with the diameter of the recovered debris, the M-80 debris was much smaller. Mr. Feedback noted that everyone in the area heard the blast of the re-created explosion. He also found large amounts of residue on the north and center toilet seats. He concluded that claimant could not have been seated in the center stall as he claimed, because there was residue on that toilet seat immediately after the incident on September 13.

Because everyone in the area heard the re-created explosion and no one heard the blast just before claimant was allegedly injured, and because of the residue found on the center toilet seat, Mr. Feedback concluded that the event could not have occurred as claimant described.

Dr. P. Brent Koprivica, who is board certified in emergency medicine and occupational medicine, saw claimant on May 29, 2007, at the request of claimant's

³ Widebrook Depo. at 4.

attorney. He took a history of the accident from claimant and reviewed his medical records. Claimant complained of a ringing in his ears and loss of hearing. He had difficulty falling asleep because of the constant ringing in his ears. He had dizziness, headaches, neck pain, and upper back pain. He had headaches on a daily basis and some photophobia. Claimant said he originally had problems with his vision, but that had improved since the accident.

After examination, Dr. Koprivica diagnosed claimant with multiple traumatic injuries from the explosion. He believed that claimant developed a closed head injury with development of a post-concussion syndrome. He believed claimant's problems with memory and headache were associated with the head injury. He also diagnosed claimant with a chronic cervical thoracic strain, which is a soft tissue injury in the neck area. He had persistent dizziness complaints with a normal electronystagmogram (ENG) testing. He had hearing loss associated with the explosion that included problems with tinnitus. Dr. Koprivica believed all these conditions were the direct result of being exposed to the explosive device at work.

When asked about the significance of a normal ENG, Dr. Koprivica stated that it is an objective test. The fact that it was normal indicates that whatever deficit claimant has is minor. Claimant was also given a brain stem test, which was normal. A normal brain stem test shows that there is no brain stem dysfunction of the hearing mechanism. It is a test for a brain stem concussive injury, which Dr. Koprivica did not think claimant had.

Dr. Koprivica stated that a person with tinnitus cannot speech discriminate when trying to hear in an area with background noise. It is a very common complaint with people who have ringing in their ear that if they are in a quiet place they can talk to someone, but if there is background noise, it causes a problem with hearing.

Based on the *AMA Guides*,⁴ Dr. Koprivica rated claimant as having a 10 percent permanent partial impairment for his closed head injury, a 5 percent permanent partial impairment for his cervical thoracic injury, a 5 percent permanent partial impairment for his dizziness, a 21 percent permanent partial impairment for his hearing loss with an additional 5 percent for his tinnitus. Combining all these using the Combined Values Chart came to 39 percent. However, he felt there was some overlapping of the impairments and reduced claimant's total rating to 35 percent permanent partial impairment to the body as a whole.

Dr. Koprivica believed that claimant's injuries were consistent with the history provided to him. He stated that a loud explosion can cause nerve injury that is permanent in nature. A diagnosis of post-concussion syndrome would have been caused by being knocked out. However, Dr. Koprivica agreed that a 35 percent impairment is excessive for

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

someone who works full time. If he was not restricted to using the *AMA Guides*, he would have assigned claimant a 20 percent permanent partial impairment.

Dr. Peter Bieri maintains two separate and distinct practices; one in ear, nose and throat and the other in disability evaluation. He examined claimant on September 11, 2007, at the request of respondent. Dr. Bieri stated that in the emergency room records of September 13, a notation was made that claimant had normal hearing. The CT scan was interpreted as normal. Claimant was seen at OHS on September 19, and no notation was made concerning hearing loss. Dr. Bieri testified that when someone sustains a traumatic hearing loss, the hearing loss is instantaneous.

An audiogram was done on claimant on July 6, 2006. The test results were consistent with what Dr. Bieri would categorize as a profound hearing loss, one that he was unfamiliar with. He had never seen anyone with that type of hearing loss in anyone under the age of 70 or 80 and never in anyone who did not utilize hearing aids. It is possible that someone taking this test could fail to depress the button when hearing tones through ear pieces. He did not know if this was done in this test.

An ENG was performed on July 26, 2006, which was normal. The results were consistent with no anatomic findings. The ENG was a test for vertigo or a vestibular source of dizziness. He admitted that if the dizziness is intermittent and is dependent upon a certain activity, the test will not always be positive. Claimant also had a brainstem audiometric evaluation on April 25, 2007. The test results were interpreted as normal. Dr. Bieri noted that claimant was able to communicate easily during the examination and demonstrated no clinical findings of hearing deficiencies to conversational tones. When he spoke with claimant, there were no other people present and the room was quiet.

Dr. Bieri opined that if claimant suffered a concussive event, it manifested itself in mild chronic cervicothoracic strain, along with a minor constellation of symptomatology characterized as post-concussion syndrome. He found no objective data to document any abnormal findings of the central nervous system or cervical spine region. Based on the documentation, claimant's complaints were consistent with cervicothoracic strain.

Using the *AMA Guides*, Dr. Bieri rated claimant as having a 5 percent whole person impairment for residuals of cervicothoracic strain of a minor nature. He opined that the only audiogram taken is consistent with a profound bilateral sensorineural hearing loss, which by itself would constitute over a 60 percent hearing impairment. However, he did not find it was supported by the clinical picture and the fact that claimant demonstrates normal ability to communicate. He stated: "While the claimant may indeed have some type of hearing loss and subjective complaint of tinnitus, no valid percentage can be awarded on the basis of the available documentation and findings."⁵ Dr. Bieri admitted

⁵ Bieri Depo., Ex. 2 at 7.

there is no test for tinnitus. Claimant told him he had ringing in his ears, and the AMA *Guides* provide a method for rating ringing in the ear. However, Dr. Bieri was of the opinion that he could not award an impairment for tinnitus on the basis of subjective complaint only.

Dr. Bieri also admitted that claimant had been diagnosed with a concussion with post concussion syndrome, which included symptomatology of subjective complaints such as headache, dizziness and cognitive dysfunction, and this is recognized as a legitimate diagnosis. He admitted that objective findings are not needed to diagnose a condition and that the AMA *Guides* provide a method of rating symptoms associated with post concussion syndrome. However, Dr. Bieri did not believe that claimant had any impairment secondary to those symptoms of a permanent nature because his ENG and brainstem responses were normal. In the absence of objective findings, he did not believe that claimant met the criteria for permanent impairment.

Claimant continues to suffer from dizziness and bad vision. He has a spot in his right eye. He has constant ringing in his ears and has reduced hearing. He has a swelling at the back of his head on both sides. He still has head, neck and back pain. If he bends over to pick something up, he tends to fall over. He gets dizzy and nauseous easily. He had none of these problems before September 2005.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.⁶

K.S.A. 44-510e states in part:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by

⁶ *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁷ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁸

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁹

In *Coleman*,¹⁰ the Kansas Supreme Court stated: "An injury to a nonparticipating employee from workplace horseplay arises out of employment and is compensable under the Kansas Workers Compensation Act."

ANALYSIS

This is a very unusual fact situation. Respondent contends it never happened—that it is a total fabrication by claimant. In support, respondent points to the fact that no one heard the explosion at the time of the alleged accident whereas everyone heard the subsequent recreation performed by Mr. Feedback. Of course, when Mr. Feedback set off the M-80 firework in the bathroom on October 11, 2005, everyone was aware of the recreation and was listening for it. Whereas, on September 13, 2005, no one was listening for an explosion (other than the person guilty of setting it off) and presumably they were

⁷ K.S.A. 2007 Supp. 44-501(a).

⁸ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

⁹ *Id.* at 278.

¹⁰ *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, Syl., 130 P.3d 111 (2006).

all busy with their various work duties. In support of claimant's contentions is the testimony of Mr. Whetsel that firecrackers had been going off on the night of the alleged accident. Also, Mr. Widebrook testified that he had overheard conversations to that effect and, after claimant was found lying on the dock floor but before the paramedics arrived, he went into the bathroom, saw and smelled smoke, and saw debris on the floor. It was obvious to him that a firework of some kind had exploded in the restroom. He believed that there were "shenanigans" going on the morning of claimant's accident.¹¹ He also believed that if a firework had gone off in the dock area that morning, he would not have been able to hear it from where he was working inside the main building.

Claimant is a 25-year employee of respondent. There is no evidence that he was untrustworthy or disgruntled. In fact, he still works for respondent. The ALJ obviously found him to be credible. After considering the record as a whole, the Board does as well. The Board finds claimant has met his burden of proving that he suffered personal injury by an accident at work on September 13, 2005, as alleged.

The next question is the nature and extent of claimant's injuries, if any, that resulted from the accident. No treating physicians testified. Claimant's expert, Dr. Koprivica, diagnosed claimant with multiple traumatic injuries, including post-concussion syndrome, a chronic cervical strain, dizziness, hearing loss and tinnitus. Pursuant to the *AMA Guides*, he rated claimant's total impairment at 39 percent. Nevertheless, his personal opinion was that there was overlapping of impairments within the *Guides* and, given claimant's demonstrated ability to return to his former job duties, his impairment of function was somewhat less than what the *Guides* would allow.

Dr. Bieri, respondent's expert, was dubious of claimant's reported symptoms. He believed the test results were inconsistent with claimant's description of his injuries, particularly with regard to hearing loss. Although the audiogram showed a profound hearing loss, claimant had a normal ENG and a normal brainstem audiometric evaluation. He also demonstrated an ability to hear at his examination. Consequently, Dr. Bieri discounted claimant's subjective complaints and rejected the hearing test as invalid, even though the audiologist that performed the test gave no indication that the test was invalid or suspect. Even so, Dr. Bieri admitted that claimant's symptoms were consistent with the alleged accident and post-concussive syndrome and further admitted that objective findings were not required to rate tinnitus and post-concussive syndrome under the *AMA Guides*. Although Dr. Bieri would not rate the hearing loss, dizziness, tinnitus, headaches, memory loss or post-concussive syndrome, he did not totally reject the notion that claimant was injured and opined claimant had a cervicothoracic strain which he rated at 5 percent under the *AMA Guides*.

¹¹ Widebrook Depo. at 11.

The Board concludes that claimant was injured as a result of the accident and sustained permanent impairment of function. The percentage of claimant's impairment under the AMA *Guides* lies somewhere between a high of the 39 percent rating opinion given by Dr. Koprivica and a low of the 5 percent given by Dr. Bieri. The ALJ found both opinions should be given some weight and determined claimant's impairment to be 20 percent. The Board agrees and affirms the ALJ's decision.

CONCLUSION

Claimant suffered personal injury by accident that arose out of and in the course of his employment, as alleged. His resulting permanent impairment of function pursuant to the AMA Guides is 20 percent.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated January 7, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Wade A. Dorothy, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge